Kwale International Sugar Company Limited v Epco Builders Limited & 2 others (Civil Appeal 208 of 2020) [2025] KECA 227 (KLR) (7 February 2025) (Judgment)

Neutral citation: [2025] KECA 227 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 208 OF 2020

DK MUSINGA, SG KAIRU & JM MATIVO, JJA

FEBRUARY 7, 2025

BETWEEN

KWALE INTERNATIONAL SUGAR COMPANY LIMITED ..... APPELLANT

AND

EPCO BUILDERS LIMITED ..... 1ST RESPONDENT

CATHOLIC ARCHDIOCESE OF MOMBASA ..... 2ND RESPONDENT

SOUTHERN ENGINEERING COMPANY LIMITED ..... 3RD RESPONDENT

(Being an appeal from the Ruling of the High Court of Kenya at Nairobi (Okwany, J.) dated 23rd April, 2020 in HCCC. Petition No. 07 of 2019)

JUDGMENT

1. Kwale International Sugar Company Limited, the appellant in this appeal, is challenging a ruling delivered by the High Court at Nairobi (W.A. Okwany, J.) on 23rd April 2020 dismissing its application dated 22nd October 2019. In that application, the appellant had sought, among other reliefs, an order that a statutory demand dated 7th June 2019 issued by Epco Builders Limited, the 1st respondent, and served on the appellant on 12th June 2019 be set aside. Also sought in the application was a declaration that the 1st respondent's Insolvency Petition No. 7 of 2019 is null and void and should be struck out; and an order of a mandatory injunction to compel the 1st respondent to recall the advertisement in the Daily Nation Newspaper of 8th July 2018 of the Insolvency Petition and publication of an apology.

2. The background to this appeal, in brief, is that in April 2012, the appellant, as employer, entered into a building contract with the 1st respondent, as contractor, under which the 1st respondent was to construct the appellant's proposed Kwale Sugar Factory for a contract price of Kshs. 2.22 billion. The 1st respondent asserts that it duly performed its obligations under the contract and submitted various invoices for payment against Certificates of Payments issued in accordance with the terms of the

contract; that the invoices were never disputed; that at a meeting held on 9th May 2016, the appellant acknowledged its indebtedness and committed to pay the outstanding balance by 30th June 2016 but failed to do so.

3. According to the 1st respondent, an amount of Kshs. 712,481,950.65 remained outstanding as at 31st May 2019 and despite several requests and demand, the appellant failed to pay; that on 12th June 2019, the 1st respondent through its advocates made a formal demand despite which the appellant still failed to pay.

4. It was on that basis that the 1st respondent instituted a Creditor's Petition dated 2nd July 2019, being Insolvency Petition No. 7 of 2019, before the High Court seeking liquidation of the appellant on grounds that it is insolvent and unable to pay its debts. In support, Ramji Devji Varsani, the Managing Director of the 1st respondent in his supporting affidavit exhibited, among other things, the contract entered into between the parties; numerous interim certificates of payment that formed the basis of the claim; as well as correspondence to demonstrate the appellant's inability to pay.

5. In a bid to halt the insolvency proceedings, the appellant filed the application dated 22nd October 2019 supported by an affidavit and supplementary affidavit of its director, Harshil Kishore Kotecha challenging the validity of the Insolvency proceedings and seeking the orders to which we have already referred at the onset of this judgment.

6. That application was based on the grounds that the relationship between the parties was governed by a contract dated 30th April 2012 which contained the terms and conditions, rights and obligations of the parties; that clause 20 of that contract provided for dispute settlement, starting with mutual consultation and then arbitration; that a dispute arose as to what, if any, was owing to the 1st respondent, and there was a possibility of the appellant setting up a counterclaim, set off or cross demand; that attempts to resolve the dispute by mutual consultation were not successful and the 1st respondent purported to issue an illegal, invalid and irregular and unenforceable statutory demand served on the appellant on 12th June 2019 which was premature as the 1st respondent ought to have referred the dispute to arbitration in accordance with the dispute resolution clause and the commencement of the Insolvency proceedings was malicious and intended to blackmail and embarrass the appellant and ruin its business.

7. The application was opposed by the 1st respondent. In his detailed replying affidavit, Ramji Devji Varsani, the Managing Director of the 1st respondent, explained the process of assessment, evaluation and certification of works under the contract; the assurances the appellant gave on payments due and delay in settlement on the basis of which the 1st respondent completed the works under the contract; that on 7th November 2016, the project Architects issued a Certificate of Final Completion and Performance confirming that the 1st respondent had fully executed all its obligations under the contract; that despite written demand made to the appellant to make payments, it had failed to do so and was deemed to be unable to pay its debts.

8. Southern Engineering Company Limited, another creditor of the appellant, in a replying affidavit asserted that the appellant had defaulted in paying an admitted outstanding debt of Kshs. 1,789,699.27. Catholic Archdiocese of Mombasa also supported the petition as a creditor.

9. In addition to the replying affidavit, the 1st respondent filed a Notice of Preliminary Objection to the application on grounds that the application was anchored on Regulations 16 and 17 of the Insolvency Regulations which provisions have no application to juridical persons or liquidation of companies.

10. Having considered the application, the affidavits, the preliminary objection, and the submissions, the learned Judge of the High Court delivered the impugned ruling on 23rd April 2020 dismissing the application. In doing so, the Judge stated:

> " My finding is that the justice of this case will require that the Insolvency Petition herein be heard on its merits. Consequently, I decline to grant the prayers sought..."

11. Aggrieved, the appellant lodged this appeal in which it has challenged that decision on the grounds enumerated in its memorandum of appeal. They include complaints that the Judge erred in: holding that the High Court had jurisdiction to determine the matter on the appellant's indebtedness when there was an arbitration clause in the contract between the parties; failing to hold that the Insolvency Petition was premature as the appellant's alleged indebtedness was disputed and yet to be determined by arbitration; terming the application as incompetent and devoid of merit; failing to find that the petition was not preceded by a statutory demand and in holding that the challenge to the validity of the demand letter was a technicality; and in failing to order the recall of the advertisement and publication of an apology.

12. During the hearing of the appeal on 26th June 2024, the parties were represented by learned counsel. Mr. B. Makokha appeared for the appellant. Mr. Okwach appeared for the 1st respondent. Mr. Andrew Ombwayo appeared for the 3rd respondent. There was no appearance for the 2nd respondent. Counsel orally highlighted their respective written submissions.

13. Counsel for the appellant submitted that the alleged debt on the basis of which the petition was instituted is disputed; that the appellant's claim is based on invalid payment certificates issued in violation of the contract and the question remains whether those certificates are valid to support the alleged debt; that under the contract, before the appellant could claim any money from the 1st respondent, it was a requirement that the works undertaken under the contract be verified by the Engineer.

14. It was urged on the strength of the decision in Nairobi Golf Hotels (Kenya) Limited vs. Lalji Bhimji Sanghani Builders and Contractors [1997] eKLR that the effect of performance certificates in a contract of construction depends on the terms of the contract; that in the present case the responsibility of issuing certificates lay with the Project Engineer under Clause 11 of the contract; that the 1st respondent's responsibilities as the contractor are only complete when the Engineer issues a performance certificate; that all of the certificates relied upon by the 1st respondent are invalid and fraudulent as none of them were issued by the Engineer; that there is therefore a bona fide dispute as to whether the performance certificates on which the 1st respondent's claim is based are valid as per the terms of the contract, which is a matter that should be determined by arbitration.

15. It was submitted that as provided in Clause 2.5 of the FIDIC Conditions of contract, the Project Engineer was obligated to verify works done by the contractor and to determine if the works meet the standards; that there was correspondence on record demonstrating that the question as to how much is owing to the 1st respondent is contentious and the performance certificates issued by the Architect are irregular. It was urged that where, as here, there is a disputed debt based on substantial and bona fide grounds, there is no basis for the petition. The case of Universal Hardware Limited vs. African Safari Club Limited [2013] eKLR was cited in support.

16. Counsel for the appellant submitted that no statutory demand was filed prior to the filing of the petition before the High Court as the law requires, but rather a demand letter had been sent and, on that basis, the High Court erred in declining to set it aside. It was submitted that under Regulation

77 of the Insolvency Regulations as introduced by Amendment 19 of the Insolvency (Amendment) Regulations, 2018, the regulation of the form of a statutory notice is mandatory; that in this case, no statutory notice was issued but rather the 1st respondent merely issued a demand letter which was neither filed nor endorsed by the Deputy Registrar as required under the regulations; that contrary to the holding by the Judge, this is a substantive, as opposed to a technical matter and the Judge erred in declining to strike out the petition on this ground.

17. It was submitted that even though the application may have invoked the incorrect provisions of the law, the court has inherent jurisdiction to consider any application before it, the provisions relied upon notwithstanding. The decision of the Supreme Court of Kenya in Hermanus Phillipus Steyn vs. Giovanni Gnecchi-Ruscone [2013] eKLR was among the decisions cited in support of that proposition.

18. Counsel for the 1st respondent on the other hand submitted that there is no basis for this Court to interfere with the exercise of the High Court's discretion in this case; that the circumstance under which the Court may interfere with the exercise of discretion by a judge, as stated in Macharia Njoroge vs. Gakure Kuria [2005] eKLR, do not arise in this case.

19. It was submitted that, as the learned Judge correctly found, there is no bona fide dispute as to the appellant's indebtedness as there exists a debt which has been unequivocally acknowledged and admitted by the appellant; that the amounts outstanding were assessed, evaluated and valued by the Quantity Surveyor and approved by the Architects and Project Engineers and certified for payment as provided under Clause 14 of the contract; that under the FIDIC contract governing the relationship between the appellant and the 1st respondent, the process of certification of payments is clearly set out, and the procedure set out therein, including valuation of works by the Quantity Surveyor, was followed in this case in issuing the certificates in respect of which payment remains outstanding; that under Clause 14.8 of the contract, the 1st respondent's entitlement to payment crystallises on issuance of a certificate; that in any event the appellant on numerous occasions admitted the debt and made part payment; that the claim that the debt is disputed is illusory.

20. Citing the case of Parklane Construction Limited vs. Fechim Investment Limited [2018] eKLR, counsel submitted that the Architect being the agent of the employer, there cannot be a dispute "between a person and itself; that as pronounced in the case of Nairobi Golf Hotels (Kenya) Limited vs. Lalji Bhimji Sanghani Builders and Contrators (above), although the effect of a final certificate is dependent on the terms of the contract, unless the certificate is impugned, payment cannot be resisted. It was urged that "the creation of a disputed debt was after service of the Insolvency Petition on appellant as a delaying tactic" and the object was to create a fictitious dispute.

21. It was pointed out that on 14th March 2018 and 14th December 2018, the appellant made part payments towards settling the debt and indicated that it was obtaining money from its sister company to offset the accruing balance; that a promise to pay a debt, such as made by the appellant, amounts to an admission of indebtedness. Among the decisions cited in support is the case of East African Portland Cement Company Limited vs. Kom Stockist Limited [2008] eKLR. Moreover, a dispute of the amount of debt without denial of the indebtedness cannot be the basis for stopping the insolvency proceedings. Consequently, it was urged, the High Court correctly found there was no basis for stopping the proceedings.

22. It was submitted further that the processes pertaining to personal bankruptcy and corporate liquidation are distinct; that the appellant had invoked Section 17 the *Insolvency Act* and Regulations 15 to 17 which relate to bankruptcy of natural persons, while liquidation of companies is exclusively

provided for under Part VI of the Act; that the Judge was therefore right in upholding the argument that the application was incompetent as the court has to be moved under the correct provisions.

23. Regarding the statutory notice, counsel submitted that the complaints raised before this Court in that regard are beyond what was raised in the High Court; that in the High Court the complaint, which was based on provisions only applicable to bankruptcy petitions, was that the notice was not in the prescribed form. The other arguments raised before this Court on the statutory notice were not canvassed before the High Court. Furthermore, it was submitted, technical defects and irregularities should not stand in the way of adjudicating disputes; the notice substantially conformed with the law and no prejudice or injustice was demonstrated on account of the alleged defects.

24. Counsel for the 3rd respondent associated fully with counsel for the 1st respondent in urging for the dismissal of the appeal.

25. In his brief rejoinder, counsel for the appellant submitted that part payment is not an admission of debt, and the 1st respondent failed to establish that the appellant was unable to pay its debts.

26. We have considered the appeal and the submissions in keeping with our mandate under Rule 31(1)(b) of the Court of Appeal Rules. [Selle & another vs. Associated Motor boats Co. Ltd & others (1968) EA 123]. In her ruling dismissing the appellant's application, the learned Judge addressed the questions: whether the court had jurisdiction to entertain the petition; whether the debt is disputed and whether the petition is premature; whether the statutory demand notice should be set aside for want of form; and whether the advertisement of the petition should be recalled.

27. On jurisdiction, the appellant contended that the court lacked jurisdiction to entertain the petition because the debt was disputed, and the dispute had not been resolved by arbitration in accordance with the dispute resolution clause. On the 1st respondent's part, it was contended that the court did not have jurisdiction to entertain the application because Regulations 16 and 17 of the Insolvency Regulations based on which the appellant had moved the court to strike out the petition did not apply to companies. In that regard, the Judge found that the debt was not disputed, that a dispute on quantum is not a denial of the debt; that in the circumstances it was not necessary to invoke arbitration and therefore the petition was properly before the court.

28. Regarding the appellant's application, the Judge held that it was incompetent because Regulations 16 and 17 of the Insolvency Regulations on which the application was anchored relate to bankruptcy of natural persons and are not applicable to liquidation of companies and the application therefore lacked merit.

29. Regarding the form of demand notice served on the appellant, the Judge stated that having regard to the overriding objective the demand notice by the 1st respondent would not be set aside for want of form as no prejudice was demonstrated. And finally, that it would be an exercise in futility to recall the advertisement of the petition that had already been published.

30. The overarching question in this appeal is whether the learned Judge was wrong in those conclusions. In addressing that question, we bear in mind that the impugned decision of the High Court involved exercise of judicial discretion. The circumstances in which we can interfere with that decision are limited. See Macharia Njoroge vs. Gakure Kuria (above). As stated by the Court in United India

Insurance Co Ltd Kenindia Insurance Company Limited & Oriental Fire & General Insurance Company Limited vs. East African Underwriters (Kenya) Ltd [1985] eKLR:

> " The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case.
>
> The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."

31. With that in mind, we begin with the matter of jurisdiction. In its application, the appellant avowedly moved the court under Section 17 of the *Insolvency Act* and Regulations 16 and 17 of the Insolvency Regulations. Undoubtedly, Section 17 of the Act relating to applications for bankruptcy order falls under Part III of the Act which deals with bankruptcy of natural persons. Regulation 16 of the Insolvency Regulations which falls under Part V on Personal Bankruptcy relates to applications for setting aside statutory demand while Regulation 17 deals with hearing of applications under Regulation 16. The learned Judge was therefore absolutely correct that those provisions "relate to bankruptcy of natural persons" and that there were no corresponding provisions in relation to liquidation of companies. Although the learned judge found that the application was incompetent on that basis, she went ahead to consider the application on merits.

32. We are, however, not persuaded, as the Judge appears to have been, that the citing of the wrong or inapplicable provisions would have divested the court of jurisdiction. As counsel for the appellant submitted on the strength of the Supreme Court decision in Hermanus Phillipus Steyn vs. Giovanni Gnecchi-Ruscone (above), the reference to the wrong provisions should not, by that reason alone, be fatal. Moreover, we think what the learned Judge stated in reference to the format of the demand notice would equally apply to the citing of erroneous provisions. In that regard, the Judge stated that the reasons advanced by the appellant for attacking the notice would not warrant the setting aside of the statutory demand notice as "courts have taken the position that they will not set aside statutory demands on mere technicality but will have regard to all the circumstances of the case."

33. In other words, the reasoning or logic the Judge applied to arrive at the conclusion that the 'format'of the statutory notice was an excusable technicality, should have applied equally in relation to the citing of the inapplicable provisions.

34. In concluding this aspect of the appeal, we hold that the Judge erred in finding that the application was incompetent on the basis that inapplicable provisions of the *Insolvency Act* and Insolvency Regulations had been invoked. We however note that despite reaching that decision, the Judge went on to consider the other grounds in the application and the conclusion we have reached does not therefore dispose of the matter.

35. The next issue is whether the Judge erred in: failing to strike out the petition on the basis that the debt is disputed; and in failing to find that the petition was premature as the dispute had not, in the first instance, been resolved by arbitration. In this regard, the learned Judge found that the appellant bore "the burden of establishing that the debt is not bona fide and is disputed on valid grounds"; that on the face of the uncontested Certificate of Completion issued by the appellant's own project Architects to confirm that the 1st respondent had fully executed its part of the contract, the appellant's claim that

the respondent did not properly or fully perform its obligations under the contract cannot hold. The Judge then stated:

> " I can conclude that the debt herein is not disputed. It is clear to me that by stating that the respondent failed to avail itself for the reconcilition verification the amount due it, the [appellant] admits owing the debt but disputes the amount owed."

36. As already stated, later in the ruling, the learned Judge found that "the justice of the case will require that the Insolvency Petition herein be heard on merits." Having found, correctly in our view, that the Petition should be heard on merits, we think it was premature for the learned Judge to have expressed in her ruling concluded views on matters that would eventually be tried. In other words, although the learned Judge ultimately arrived at the correct decision that the petition should be heard on merits, the concluded views in the ruling on whether there was a bona fide dispute over the debt was premature, and possibly prejudicial to the appellant. Absent an express and unequivocal admission of the debt, we think the Judge should have refrained from expressing concluded views on the matter and should have left it to the trial court to do so.

37. The caution by Madan, JA. in the context of an application to strike out pleadings in the case of D.T. Dobie & Company (Kenya) Limited vs Joseph Mbaria Muchina & Another [1980] eKLR apply equally to the circumstances in this case. Madan, JA. stated that:

> " The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof, before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits "without discovery, without oral evidence tested by cross- examination in the ordinary way". (Sellers, L.J. (supra)). As far as possible, indeed not at all, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks it right."

38. Ultimately, we hold that the learned Judge was right in dismissing the application. Therefore, the appeal fails and is hereby dismissed. In view of the conclusion we have reached regarding the reasoning by the learned Judge, we direct that the Insolvency Petition before the High Court shall proceed for hearing (if it has not already been concluded) before a Judge other than Okwany, J., and each party shall bear its own costs of this appeal.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF FEBRUARY, 2025.

D.K. MUSINGA, (PRESIDENT)

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.